

Employment Practices Liability Insurance: Common Risks and Controls

Introduction

Employment Practices Liability Insurance (EPLI) is designed to provide coverage for claims made against an employer which arise from wrongful employment practices such as discrimination, sexual harassment, and wrongful termination. The coverage is for *financial* “damages” only. “Advertising Injury”, “Bodily Injury”, “Personal Injury”, and “Property Damage” are excluded. Additionally, the policy is written on a claim-made basis. This means that the wrongful practice must *occur* after the Retroactive Date but before the expiration date of Coverage part *and* the claim must be *made* during the policy period or any extended reporting period. Legal defense costs usually are considered to be within limits, meaning that any legal costs arising to defend the claim will reduce the limit of insurance being provided by that amount. However, some policies will provide for defense costs outside of limits.

Wrongful Employment Practices

A considerable number of wrongful employment practices may occur in the employment relationship. EPLI Coverage Forms usually list the following:

- Wrongful refusal to employ a qualified applicant for employment.
- Wrongful failure to promote a qualified employee.
- Wrongful demotion, evaluation, reassignment, or discipline of an employee, including constructive discharge.
- Harassment, coercion, or unfair discrimination as a consequence of such things as race, color, creed, gender, etc.
- Defamation of character.
- Oral or written publication of material that slanders or libels an employee or violates or invades an employee’s right of privacy.

This article will discuss three of the more common liabilities – discrimination, sexual harassment, and wrongful termination – and will offer some suggestions on how to control these exposures.

Discrimination

Discrimination may take many forms. Primarily, claims of discrimination are based on Title VII of the Civil Rights Act of 1964 and amendments of 1991, and fall under the scrutiny of the Equal Employment Opportunity Commission (EEOC). Title VII covers discrimination complaints based on:

- Race
- Color
- National origin
- Religion
- Gender
- Age, and other factors

LOSS CONTROL TIPS

The intent of Title VII is to ensure that employment decisions are made on the basis of an individual's qualifications for a particular job, rather than personal biases. There are other laws that protect employees from discrimination in the workplace, including the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963.

The first step in minimizing the exposure to claims of discrimination is to create a fair and unbiased employment application, followed by well-designed and specific job descriptions for each position within the organization.

Employment applications can do much to reduce the possibility of being accused of discrimination. The application should be reviewed periodically by the company's legal advisor. Inappropriate questions which may be viewed as discriminatory (such as asking the applicant's race or national origin) should be eliminated. This information should have no bearing on the candidate's ability to perform the job.

An application should be accepted for a specific position. If applications are accepted for "any position" or "whatever is open," the employer may be required to consider *all* the applicants when *any* position becomes available. Applications should be time-specific; e.g., sixty or ninety days should be designated as the period of time in which the applications will be retained for consideration. Finally, there should be a sign-off where the candidate acknowledges that the information being provided is true and correct and that the candidate has read and understood the information included on the application.

The other major control is a well worded and well thought out job description. The job description should indicate the job criteria; i.e., the physical requirements, educational requirements, and experience requirements. Where possible, the criteria should be quantifiable. An example would be the physical requirement to "be able to lift 30 pounds every 5 minutes for 4 hours." An application that merely states "some lifting required" is not as precise and may afford much less liability protection.

Job descriptions should receive periodic review and updating. Whatever the job criteria are, they must be equally applied to all applicants. In other words, it is not appropriate to make selected applicants take a pre-placement physical examination because the employer believes that a disability or pre-existing condition exists. If a physical examination is indicated, it must be required for all applicants and it must relate directly to the job itself.

Sexual Harassment

Charges of sexual harassment have become more prevalent in recent years. What is acceptable conduct in the workplace has become more defined and a failure to maintain a sexual harassment policy can lead to litigation. Sexual harassment is unwelcome sexual advances, requests for sexual favors, and may also include verbal, visual, and physical conduct of a sexual nature. There are two categories of sexual harassment:

- *Quid pro quo* (meaning "this for that"). This category identifies harassment in which sexual contact is made a condition of employment (for which there is strict liability). An example is a supervisor who indicates that his female subordinate will gain the promotion she is seeking only if she consents to a sexual relationship.
- *Hostile environment*. This category identifies harassment in which unwelcome conduct creates an intimidating, hostile, or offensive working environment. An example is a male employee who continuously "ogles" or touches a female employee.

The main control for this exposure is a formal, written program to deal with sexual harassment. The program should have a very clear policy statement which indicates that such conduct is unacceptable and which outlines possible consequences if such conduct is found.

The program should also include the following:

- *An on-going training program* for all employees, which outlines what constitutes sexual harassment and what is the company's policy. Employees should date and sign an acknowledgment that they understand the policy.
- *Education for managers and supervisors* to ensure that they understand what constitutes sexual harassment and what actions should be taken when a condition is noticed or a complaint is made. Managers and supervisors must listen to employees' concerns, must take complaints seriously, and must investigate them promptly. The investigation should be made thoroughly and confidentially. Where harassment is found, swift and appropriate action must be taken. A three-to four-month follow up time is also recommended to assure that the harassment has ceased.
- *Appropriate documentation*, including sign offs that the parties have understood the issues and that the solutions are mandatory. Any disciplinary action must be documented and placed in the employee's personnel file. Documentation of training programs and employee sign-offs indicating class attendance and understanding is also appropriate.

Wrongful Termination

Wrongful termination is another employment claim that can lead to liability exposure. The key to controlling this exposure is to have sound, written policies and procedures that are communicated to both management and employees, and the consistent application of the principles upon which they are based.

Depending on the jurisdiction, employees are hired by one of two methods: *employment-at-will* or *termination-for-cause*:

- *Employment-At-Will* means that an employer may dismiss employees at the employer's discretion, at any time, for any reason or for no reason, and without giving the employee prior notice.
- *Termination-For-Cause* means that an employer must have a justifiable reason for an employee's termination.

Most states have forgone the Employment-At-Will method. However, even in states where this method is still in place, courts have found that the employer cannot just indiscriminately terminate an employee without some justification.

Employment terminations should be based upon performance or conduct. Performance expectations should be outlined in a well-written job description. Where the level of performance falls short of the job requirements, the employee should be made aware of the problem and, if appropriate, be given an opportunity to meet those requirements. Proper documentation should be maintained. Where substandard performance continues, additional written warning and disciplinary action may be appropriate. Again, these should also be documented.

Where documentation is placed in the employee's file, it should be free of ambiguity. The problems should be simply stated, the corrective action(s) should be specifically outlined, and, where possible, the measurements of performance should be quantifiable.

Some considerations in preventing wrongful termination lawsuits include the following:

- Do not promise what you cannot, will not, or may decide later not to honor.
- Establish rules, and make sure employees are aware of them and understand them.
- Implement the rules fairly and consistently.
- Be candid with employees.
- Put employees on notice; use progressive discipline, except in cases of extreme misconduct.
- Consider options short of discharge.
- Be tactful but absolutely frank about the reasons for discharge.
- Do not discuss the reasons for an employee's discharge with other employees.
- Confine job references to length of service, final position held, and rate of pay at the time of termination.

Summary

This article has reviewed some of the issues, exposures, and controls concerning the Employment Practices Liability Insurance coverage. EPLI is designed to provide coverage for claims made against an employer for wrongful employment practices. The coverage is for financial damages only and is usually written on a claim-made basis. Examples of wrongful employment practices were given, along with some added detail concerning some of the more common exposures of discrimination, sexual harassment and wrongful termination. Finally, some risk management controls for these exposures were provided.

Employment Practices Liability Insurance is a volatile and growing coverage, but if sound policies and procedures are developed, communicated, and implemented, it can be adequately controlled.

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